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In the Supreme Court of the United States

OCTOBER TERM, 1995

WILLIAM JEFFERSON CLINTON, PETITIONER

v.

PAULA CORBIN JONES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a private civil action for damages against the President of the United States, based on events occurring before the President took office, should be permitted to go forward during the President's term of office.

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INTEREST OF THE UNITED STATES

This is a private civil action for damages against the President of the United States based on conduct that is alleged to have occurred before the President took office. The decision below compels the President to participate in discovery and defend himself at trial while he is in office. The United States has a substantial interest in protecting the Office of the President and the powers and duties vested in that office by Article II of the Constitution. The United States is therefore directly interested in whether, and under what circumstances, a sitting President may be

compelled to take part in judicial proceedings in state or federal court.[1]

STATEMENT

1. In May 1994, respondent Paula Corbin Jones filed a civil action against petitioner William Jefferson Clinton, President of the United States and former Governor of Arkansas, and Danny Ferguson, an Arkansas state trooper. Respondent alleged that then-Governor Clinton had sexually harassed her three years earlier, when respondent was a state employee, and that she was thereafter subjected to job-related retaliation. Compl. ¶¶ 6-34, 39. She further alleged that she was defamed in 1994 by statements, which she attributed to the President and Ferguson, relating to the alleged harassment.

Respondent filed a four-count complaint in the United States District Court for the Eastern District of Arkansas, presenting federal and state law claims against the President and Ferguson.[2] With respect to each of the four counts, she sought $75,000 in compensatory damages and $100,000 in punitive damages. Respondent did not seek injunctive relief.

[1] The United States has participated in other cases that have presented related issues of Presidential participation in judicial proceedings. The United States participated as an *amicus curiae* in *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982), which involved the President's immunity from civil actions for damages based on the President's conduct in office. Similarly, in *In Re Proceedings of the Grand Jury Impaneled December 5, 1972*, Civil 73-965 (D. Md.) (mem. filed Oct. 5, 1973), which involved the amenability of a sitting Vice President to a criminal indictment and trial, the United States also addressed the amenability of a sitting President to prosecution. In addition, the United States participated as an *amicus curiae* in *United States* v. *Poindexter*, 732 F. Supp. 142 (D.D.C. 1990), regarding the amenability of former President Reagan to a criminal subpoena relating to the Iran-Contra affair, and currently is participating in *United States* v. *McDougal*, Nos. 96-2606 & 96-2671 (8th Cir.) regarding testimonial subpoenas issued to President Clinton. The United States has participated as well in federal and state courts in cases involving the immunity of foreign heads of state. See, *e.g.*, *LaFontant* v. *Aristide*, 844 F. Supp. 128 (E.D.N.Y. 1994); *Anonymous* v. *Anonymous*, 581 N.Y.S.2d 776 (N.Y. App. Div. 1992).

In August 1994, the President filed a motion to dismiss the suit without prejudice or, in the alternative, to stay the suit until the conclusion of his service in office. In December 1994, the district court entered an order denying the President's motion to dismiss but partially granting the President's alternative motion for a stay. Pet. App. 54-77. The district court held, however, that pretrial discovery could proceed "as to all persons including the President himself." *Id.* at 71.

2. The President and respondent filed timely cross-appeals from the district court's order. A divided panel of the Eighth Circuit affirmed the denial of the President's motion to dismiss, reversed the grant of a partial stay, and remanded with instructions to allow the suit to proceed. Pet. App. 1-31. The court held that the President "is entitled to immunity, if at all, only because the Constitution ordains it." *Id.* at 16. It then determined that the Constitution does not grant the President immunity from private suits based on his unofficial acts. *Ibid.* It reasoned that the President's absolute immunity under *Nixon* v. *Fitzgerald*, 457 U.S. 831 (1982), for acts within the "outer perimeter" of his official duties represents the only Presidential immunity under the Constitution. Pet. App. 8-9.

[2] Count I asserts due process and equal protection claims against Clinton under 42 U.S.C. 1983. Count II asserts a claim under 42 U.S.C. 1985 against Clinton and Ferguson for conspiracy to commit the constitutional violations alleged in Count I. Count III presents a common law claim against Clinton for intentional infliction of emotional distress. Count IV presents common law claims against Clinton and Ferguson for defamation. See Pet. App. 4, 41.

The court held that it was an abuse of discretion for the district court to stay the trial in the absence of constitutionally mandated immunity. *Id.* at 13 n.9. The dissenting judge concluded that private actions for damages against a sitting President based on the President's unofficial acts should be stayed until the completion of the President's term "unless exigent circumstances can be shown." *Id.* at 25.

SUMMARY OF ARGUMENT

1. To require that the President defend against private civil lawsuits in state and federal courts during his term of office would intrude impermissibly upon the President's performance of his constitutional duties, in violation of separation of powers principles. In both constitutional and practical terms, the demands placed upon the President under Article II are unceasing. A sitting President cannot defend himself against litigation seeking to impose personal financial liability without diverting his energy and attention from the exercise of the "executive Power" of the United States. A judicial order requiring the President to participate in the defense of a private civil suit would therefore place the court in the position of impairing a coordinate Branch of the government in the performance of its constitutional functions.

This Court's decision in *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982), strongly indicates that the instant suit should be deferred. Although *Fitzgerald* involved a challenge to the President's performance of his official functions, the Court's analysis is highly relevant to the question whether litigation involving alleged pre-Presidential misconduct may go forward during the President's term of office. The Court's decision makes clear that the public interest in the President's unimpaired performance of his duties must take precedence over a private litigant's

desire to obtain redress for legal wrongs. The court of appeals erred in concluding that deferral of this lawsuit would represent an unwarranted extension of the rule announced in *Fitzgerald*. The burdens created by the litigation process pose a different threat to the Presidency than that which concerned the Court in *Fitzgerald*, but the threat is no less real. Deferral of the instant case, moreover, would be far less burdensome to the plaintiff than was the absolute immunity recognized in *Fitzgerald*, which *permanently* foreclosed the plaintiff from seeking redress in court for wrongs allegedly done by the President in his official capacity.

2. The power to stay civil proceedings is a basic and long-settled judicial power. Staying a private suit until the conclusion of the President's term of office prevents the diversion of the President's time and attention while preserving the plaintiff's right ultimately to obtain redress if her claims are determined to be meritorious. A stay therefore strikes the appropriate balance between the public and private interests involved. Because the burdens imposed by pretrial discovery are frequently greater than those imposed by the trial itself, the public and constitutional interests implicated by this suit can be adequately protected only if discovery (as well as trial) is stayed until the conclusion of the President's service.

The court of appeals erred in concluding that the threat posed by ongoing civil litigation against the President could be adequately addressed by "judicial case management." In view of the unceasing nature of the President's official duties, the requirement that the President defend against a private lawsuit during his term of office necessarily and seriously impairs his authority to balance the competing demands upon his attention. The problem is exacerbated by the fact that the President may not be at liberty to articulate publicly the precise nature of those

competing demands. In addition, reliance on case management potentially subjects sitting Presidents to broad and possibly inconsistent exercises of discretion by state and federal trial judges across the country.

ARGUMENT

President James Monroe observed that the duties entrusted to the President "are sufficient to employ the whole mind, and the unceasing labors, of any individual." Herman Finer, *The Presidency: Crisis and Regeneration* 35-36 (1960). This case presents the question whether, notwithstanding those continuous constitutional duties, a sitting President may be compelled to defend himself against private claims for damages, based on events that are unrelated to the exercise of his official duties and are alleged to have occurred prior to his term of office.[3]

The court of appeals failed to recognize the fundamental incompatibility between the private demands of civil litigation and the President's constitutional responsibilities for exercising the "executive Power" of the United States.[4] The court also misunderstood the

[3] The case also presents one claim, the defamation claim in Count IV, that concerns statements made after the President took office. Count IV thus raises an additional and distinct immunity question under *Fitzgerald*, *supra*. Neither the district court nor the court of appeals addressed whether Count IV comes within the scope of the President's absolute immunity under *Fitzgerald* (see Pet. App. 9 n.7), and that issue is not before this Court.

[4] The United States is aware of three instances prior to this one in which a private suit against a President based on events occurring before the President took office have been heard during the President's term. Those instances are noted in the opinion of the court of appeals. See Pet. App. 14 n.10. Each of those cases was commenced before the beginning of the President's service—indeed, two were already on appeal when the President took office. *Ibid*. As far as the United States has been able to determine, none of the courts was asked to dismiss or stay the litigation on the basis of any constitutionally grounded immunity after the President took office. See *ibid*.

significance of this Court's decision in *Fitzgerald*, which supports rather than forecloses the President's request to postpone this litigation. Finally, the court of appeals was mistaken in believing that the danger to the Presidency posed by suits like this one can be addressed through *ad hoc* exercises in judicial "case management." A rule that subjects sitting Presidents to suits in state and federal courts across the country, subject to the exercise of discretion by trial judges over the day-to-day management of the litigation, would leave the President's discharge of his official responsibilities in serious jeopardy. It would also enmesh state courts in the affairs of the national government and federal courts in the conduct of the head of a coordinate Branch. Only a complete stay of proceedings during the President's service in office takes sufficient account of the constitutional interests of the United States at stake in this case.

I. COMPELLING A SITTING PRESIDENT TO DEFEND HIMSELF IN PRIVATE LITIGATION CONFLICTS WITH THE REQUIREMENTS OF THE PRESIDENT'S OFFICE UNDER ARTICLE II OF THE CONSTITUTION

A. Proper analysis of the issue before this Court begins with the "basic principle of our constitutional scheme that one branch of the Government may not intrude upon the central prerogatives of another." *Loving* v. *United States*, 116 S. Ct. 1737, 1743 (1996); see also *Nixon* v. *Administrator of Gen. Serv.*, 433 U.S. 425, 443 (1977) ("the proper inquiry focuses on the extent to which [the challenged action] prevents the Executive Branch from accomplishing its constitutionally assigned func-

tions"). Separation of powers principles "require[] that a branch not impair another in the performance of its constitutional duties." *Loving*, 116 S. Ct. at 1743.

Those concerns are implicated whenever a litigant seeks to invoke the processes of the courts against the President. To be sure, separation of powers principles "do[] not bar every exercise of jurisdiction over the President of the United States." *Fitzgerald*, 457 U.S. at 753-754; see *United States* v. *Nixon*, 418 U.S. 683 (1974). Nonetheless, "the President's constitutional responsibilities and status [are] factors counseling judicial deference and restraint." *Fitzgerald*, 457 U.S. at 753; see, *e.g.*, *Franklin* v. *Massachusetts*, 505 U.S. 788, 800-801 (1992) (construing APA's judicial review provisions not to apply to President "[o]ut of respect for the separation of powers and the unique constitutional position of the President"); *United States* v. *Nixon*, 418 U.S. at 708 (quoting *United States* v. *Burr*, 25 F. Cas. 187, 192 (C.C. D. Va. 1807) (No. 14,694)) ("[i]n no case of this kind would a court be required to proceed against the president as against an ordinary individual"). Accordingly, "before exercising jurisdiction, [a court] must balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch." *Fitzgerald*, 457 U.S. at 753-754.

If the President is required to defend himself against private lawsuits during his term of office, "the dangers of intrusion on the authority and functions of the Executive Branch" are manifest. The "burdens, stress, and time [associated with] litigation," *Marek* v. *Chesney*, 473 U.S. 1, 10 (1985), are well known. See generally *Siegert* v. *Gilley*, 500 U.S. 226, 232 (1991) (discussing litigation burdens); *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985) (same); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 817-818 (1982) (same). Learned Hand observed that, "as a litigant, I

should dread a lawsuit beyond almost anything else short of sickness and of death." Jerome Frank, *Courts on Trial* 40 (1950). Where claims focus on a defendant's actions, the defendant must devote substantial time and energy to the factual disputes underlying the claims. Among other things, the defendant must prepare for and give deposition testimony; provide the information needed to pursue and answer other forms of discovery demands; and assist his counsel in developing the factual record. In addition, the defendant must consult with his counsel on an ongoing basis about choices relating to pretrial and trial strategy.

Those burdens, while real and substantial, are ordinarily a matter of purely private concern. When they are imposed on the President, however, they implicate public and governmental interests of constitutional dimension. "The President occupies a unique position in the constitutional scheme," one that "distinguishes him from other executive officials." *Fitzgerald*, 457 U.S. at 749, 750. The President is the sole repository of the "executive Power" created by Article II of the Constitution. *Id.* at 749-750. He bears the power and responsibility to "take Care that the Laws [are] faithfully executed." See *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 577 (1992) (Take Care Clause constitutes "the Chief Executive's most important constitutional duty"). The President serves as "the sole organ of the federal government in the field of international relations," *United States* v. *Curtiss-Wright Export Corporation*, 299 U.S. 304, 320 (1936), and his "duties as Commander in Chief * * * require him to take responsible and continuing action to superintend the military," *Loving*, 116 S. Ct. at 1750. In the words of former President Truman, "every final important decision has to be made right here on the President's desk, and only the President can make it." Edward Corwin, *The President: Office and Powers, 1787-1984* (1984).

In both practical and constitutional terms, the demands placed on the President under Article II are unceasing. The President sits at the apex of an Executive Branch that includes nearly 3 million civilian employees. See U.S. Bureau of the Census, *Statistical Abstract of the United States: 1995*, at 350 (1995). As Commander in Chief he directs the activities of over 1 million active duty service members. *Id.* at 357. Our system of government presumes, moreover, that the President will exercise ultimate authority over—and will accept political accountability for—the actions of all officials within the Executive Branch and the Armed Forces. Cf. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865 (1984) (deference to unelected agency officials is justified because "[w]hile agencies are not directly accountable to the people, the Chief Executive is"); *Myers* v. *United States*, 272 U.S. 52, 123 (1926) ("it may be, at some times, on some subjects, that the President elected by all the people is rather more representative of them all than are the members of either body of the Legislature whose constituencies are local and not countrywide").

As a practical matter, the countless issues of domestic and foreign policy that demand the President's attention fully occupy, and indeed outstrip, the capacity of the President to respond. See, *e.g.*, Clinton Rossiter, *The American Presidency* 2, 28 (1987). In the words of one scholar, "[b]eing president is a little like being a juggler who is already juggling too many balls and, at the most frustrating moments, is forever having more balls tossed at him." Thomas E. Cronin, *The State of the Presidency* 156 (1980). Another scholar has observed that the President "is expected to do too many jobs at once; he cannot give proper attention to them all. He must simultaneously conduct the diplomacy of a superpower, put

together separate coalitions to enact every piece of legislation required by a vast and complex society, manage the economy, command the armed forces, serve as a spiritual example and inspiration, respond to every emergency." Godfrey Hodgson, *All Things to All Men: The False Promise of the Modern American Presidency* 239 (1980). As a result, the Presidency's most precious commodity is time, and one of the most vexing problems for the President and his staff is how to divide that time among the disparate issues that call for his attention. Deadlines "rule [the President's] personal agenda," and the President typically faces "deadlines enough to drain his energy and crowd his time regardless of all else." Richard E. Neustadt, *Presidential Power and the Modern Presidents: The Politics of Leadership from Roosevelt to Reagan* 130 (1990).

Throughout the country's history, Presidents have remarked upon the overwhelming burdens of the Presidency. Our first President, George Washington, wrote that "[t]he duties of my Office * * * at all times * * * require an unremitting attention." Arthur B. Tourtellot, *The Presidents on the Presidency* 348 (1964). President Jefferson explained that his duties "enjoin[ed] his constant agency in the concerns of 6 millions of people," and that even during his annual vacation, "the public business * * * goes on as unremittingly." 3 Philip B. Kurland & Ralph Lerner, *The Founders' Constitution* 530-531 (1987). President John Quincy Adams said that he could "scarcely conceive a more harassing, wearying, teasing condition of existence." Tourtellot, *supra*, at 349. President Polk complained that "[t]he public have no idea of the constant accumulation of business requiring the President's attention." Finer, *supra* at 36. President Benjamin Harrison observed that "it is a rare piece of good fortune during the early months of an administration if the

President gets one wholly interrupted hour at his desk each day." Tourtellot, *supra*, at 360. President Theodore Roosevelt noted that "[e]very day, almost every hour, I have to decide very big as well as very little questions." *Id.* at 361. President Taft noted that "[o]ne trouble is no sooner over in this office than another arises." *Id.* at 363. President Wilson stated that "the amount of work a President is supposed to do is preposterous" and concluded that "[m]y work can be properly done only if I devote my whole thought and attention to it and think of nothing but the immediate task at hand." *Id.* at 365.

In the modern era of United States leadership as a world power, the responsibilities noted by earlier Presidents have only increased. President Truman concluded that "the pressures and complexities of the Presidency have grown to a state where they are almost too much for one man to endure." Finer, *supra*, at 37. President Eisenhower observed that "the duties of the President are essentially endless. No daily schedule of appointments can give a full timetable—or even a faint indication—of the President's responsibilities. Entirely aside from the making of important decisions, the formulation of policy through the National Security Council, and the Cabinet, cooperation with the Congress and with the States, there is for the President a continuous burden of study, contemplation and reflection." Tourtellot, *supra*, at 372-373. President Lyndon Johnson recounted that "[o]f all the 1,886 nights I was President, there were not many when I got to sleep before 1 or 2 a.m., and there were few mornings when I didn't wake up by 6 or 6:30." Lyndon B. Johnson, *The Vantage Point* 425 (1971).

The unceasing nature of the President's duties is reflected in the constitutional structure of his office. In contrast to the Congress, which is required to assemble only "once in every Year" (Const. Art. I, § 4) and which

may adjourn on a regular basis (*id.* § 5), the President must attend to his duties as Chief Executive and Commander-in-Chief continuously throughout his tenure.[5] The Twenty-Fifth Amendment, with its elaborate machinery for carrying out the President's functions when he "is unable to discharge the powers and duties of his office," confirms that constitutional imperative. The sponsors of the Twenty-Fifth Amendment stressed the need to ensure "that there will be a President of the United States at all times * * * who has complete control and will be able to perform all the powers and duties of his office." 111 Cong. Rec. 15,595 (1965) (Sen. Bayh). In the words of one of the Amendment's principal sponsors, "this Nation cannot permit the Office of the President to be vacant even for a moment." *Presidential Inability: Hearings before the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 2 (1965) (Rep. Celler).[6]

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[5] Responding to the argument that a sitting President enjoys no immunity from the processes of the courts, President Jefferson stated that "[t]o comply with such calls would leave the nation without an executive branch, whose agency, nevertheless, is understood to be so constantly necessary, that it is the sole branch which the constitution requires to be always in function." Kurland & Lerner, *supra*, at 530.

[6] Witnesses who testified before Congress in support of the Twenty-Fifth Amendment were equally emphatic about the dangers of any interruption in the exercise of the President's powers. Clinton Rossiter, a noted Presidential scholar, stated that "an uninterrupted * * * exercise of the full authority of the Presidency" was "[p]erhaps the most pressing requirement of good Government in the United States today," and former Attorney General Herbert Brownell stated that the Nation's "very survival * * * may rest upon the capacity of the Nation's Chief Executive to make swift and unquestioned decisions in an emergency." *Presidential Inability and Vacancies in the Office of the Vice President: Hearings Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 88th Cong., 2d Sess. 134-135, 214 (1964).

A sitting President cannot adequately defend himself against litigation seeking to impose personal financial liability without diverting his time and attention from the exercise of the "executive Power" under Article II. As a result, a court that compelled the President to participate as a party in the defense of a civil suit during the President's term of office would place itself in the position of "impair[ing] another [branch] in the performance of its constitutional duties." *Loving*, 116 S. Ct. at 1743. The Constitution does not permit that result.

B. This Court's decision in *Fitzgerald*, *supra*, supports the proposition that the maintenance of private suits against a sitting President would trench impermissibly on the Presidential office under Article II. In *Fitzgerald*, this Court held that the President is entitled to absolute immunity from claims for damages "for acts within the 'outer perimeter' of his official responsibility." 457 U.S. at 756. The Court characterized that immunity as "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history." *Id.* at 749.[7]

The Court placed primary reliance on the prospect that the President's discharge of his constitutional powers and duties would be impaired if he were subject to suits for damages based on his official conduct. 457 U.S. at 751-754. To expose the President to suits for damages based on his official actions, the court reasoned, could deprive him of

[7] The Court discussed in some detail historical precedents regarding the susceptibility of sitting Presidents to judicial process. See 457 U.S. at 751-752 n.31. The Court noted, *inter alia*, that such early Americans as John Adams, Thomas Jefferson, Oliver Ellsworth and Joseph Story believed the President not to be subject to judicial process. *Id.* at 751 n.31. The Court concluded that "[t]he best historical evidence clearly supports" a rule of absolute immunity for a President's official actions. *Id.* at 752 n.31.

" 'the maximum ability to deal fearlessly and impartially with' the duties of his office." *Id.* at 752. The Court observed that, "[b]ecause of the singular importance of the President's duties, diversion of his energies by concern with private lawsuits would raise unique risks to the effective functioning of government." *Id.* at 751. In his concurring opinion, Chief Justice Burger also noted the possibility that private suits for damages against a President could be used for purposes of harassment and extortion. *Id.* at 762, 763.

When the President is sued for actions wholly unrelated to his official responsibilities, *Fitzgerald*'s concern for ensuring "fearless[] and impartial[]" Presidential decision making is not directly implicated. The more general concerns underlying this Court's holding, however, apply with equal force. *Fitzgerald* recognizes that "[t]he President occupies a unique position in the constitutional scheme," 457 U.S. at 749; that the President should not be diverted from attending to the national welfare by "concern with private lawsuits," *id.* at 751; and that the public interest in the President's unimpaired attention to his official responsibilities must take precedence over a private litigant's desire to obtain redress for legal wrongs, *id.* at 754 n.37. As explained above, the President would be faced with a "diversion of his energies by concern with private lawsuits," *id.* at 751, if he were compelled to defend himself against a private suit for damages during his term in office. That diversion would "raise unique risks to the effective functioning of government." *Ibid.* The teaching of *Fitzgerald* is that the judicial system should not lend itself to such risks.[8]

[8] A similar lesson can be drawn from the evident immunity of a sitting President from criminal prosecution. The available evidence strongly indicates that the Framers did not contemplate the possibility

C. The court of appeals read *Fitzgerald* to mark the outer limit of Presidential immunity. Pet. App. 8-9. In the court's view, "[t]he [Supreme] Court's struggle in *Fitzgerald* to establish presidential immunity for acts within the outer perimeter of official responsibility belies the notion * * * that beyond this outer perimeter there is still more immunity waiting to be discovered." *Id.* at 9. Because the instant case involves claims that are (with one possible exception, see note 3, *supra*) beyond "the 'outer perimeter' of [the President's] official responsibility," *Fitzgerald*, 457 U.S. at 756, the court of appeals concluded that *Fitzgerald* precluded the recognition of any constitutionally grounded immunity here. Pet. App. 9. And because the court of appeals believed that the President "is entitled to immunity, if at all, only because the Constitution ordains it," *id.* at 16, the court regarded *Fitzgerald* as dispositive of the question whether a sitting President may be compelled to defend against a private lawsuit during his service in office.

The court of appeals erred in asserting that deferral of litigation until the President leaves office would "extend[] presidential immunity beyond the outer perimeter delineated in *Fitzgerald*." Pet. App. 9. The plaintiff in *Fitz-*

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that criminal prosecutions could be brought against a sitting President. See, *e.g.*, 2 Max Farrand, *Records of the Federal Convention of 1787*, at 64-69, 500 (New Haven 1911); *The Federalist* No. 69, at 416 (Hamilton) (C. Rossiter ed. 1961) (the President "would be liable to be impeached, tried, and, upon conviction * * * removed from office: and would *afterwards* be liable to prosecution and punishment in the ordinary course of law") (emphasis added). As the Court noted in *Fitzgerald*, "there is a lesser public interest in actions for civil damages than * * *in criminal prosecutions." 457 U.S. at 754 n.37. In *In Re Proceedings of the Grand Jury Impaneled December 5, 1972*, Civil 73-965 (D. Md.) (mem. filed Oct. 5, 1973), the United States took the position that while a sitting Vice President is subject to criminal prosecution, a sitting President is not.

gerald did not name former President Nixon as a defendant until nearly four years after the conclusion of his Presidency. See 457 U.S. at 740. The case therefore did not implicate—and the Court accordingly did not discuss—the potential conflicts between a sitting President's performance of his constitutional responsibilities and the demands placed upon the defendant in a civil lawsuit. Rather, the Court focused on the danger that the President's willingness to discharge his official duties "fearlessly and impartially," *id.* at 752, might be impaired by the prospect of *future* suits for damages based upon the performance of those duties, see *id.* at 751-753 & n.32. The burdens imposed by the litigation process pose a *different* threat to the Presidency than that which concerned the Court in *Fitzgerald*, but the threat is no less real. Nothing in *Fitzgerald* suggests that those burdens should be deemed insubstantial where the President is sued during his term of office.[9]

The temporary deferral of litigation sought by the President here, moreover, is far less burdensome to potential plaintiffs than is the absolute immunity recognized in *Fitzgerald*. Under *Fitzgerald*, even a plaintiff whose most basic legal rights have been deliberately violated by the President acting in his official capacity may be permanently foreclosed from obtaining redress in the courts.

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[9] In the context of suits against subordinate executive branch officials, this Court has consistently recognized that "[o]ne of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Siegert* v. *Gilley*, 500 U.S. 226, 232 (1991). That concern applies with particular force to the President of the United States. Cf. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 811 n.17 (1982) ("Suits against other officials—including Presidential aides—generally do not invoke separation-of-powers considerations to the same extent as suits against the President himself.").

Deferring the instant suit until the conclusion of the President's service, by contrast, affects only the timing of the litigation. However the issue currently before this Court is resolved, respondent will ultimately be afforded an opportunity to prove her claims, and to obtain relief if those claims are found to be meritorious.

Thus, the deferral of litigation sought here does not, as the court of appeals believed, extend "beyond" the immunity recognized in *Fitzgerald*. It is simply a different form of relief designed to prevent a different form of encroachment on the President's ability to perform his constitutional functions. There can, moreover, be no doubt that the burden on the plaintiff imposed by *Fitzgerald*'s rule of absolute immunity for official acts is far greater than the burden that would be imposed by the stay sought here. Thus, while the permanent immunity recognized in *Fitzgerald* is limited to "acts within the 'outer perimeter' of [the President's] official responsibility," 457 U.S. at 756, *Fitzgerald* in no way forecloses the temporary deferral of litigation sought by the President in this case. To the contrary, as explained above, *Fitzgerald*'s reasoning directly supports that accommodation of the public and private interests involved.

The reasoning of the court of appeals is also flawed by the court's erroneous premise that official immunity is confined to cases in which "the Constitution ordains it." Pet. App. 16. This Court has made clear that official immunity need not be grounded directly in the Constitution. See, *e.g.*, *Butz* v. *Economou*, 438 U.S. 478, 497 (1978) ("the doctrine of official immunity from § 1983 liability * * * [is] not constitutionally grounded"); *Pierson* v. *Ray*, 386 U.S. 547 (1967); *Fitzgerald*, 457 U.S. at 747 ("Our decisions concerning the immunity of government officials from civil damages liability have been guided by the Constitution, federal statutes, and history,"

and "[t]his Court necessarily also has weighed concerns of public policy, especially as illuminated by our history and the structure of our government."). *A fortiori*, no direct constitutional mandate is required for the more limited kind of accommodation at issue in this case, which defers rather than denies a plaintiff's opportunity to pursue his or her claims in court. Thus, even if Article II and separation of powers principles did not compel the postponement of private suits against sitting Presidents *ex proprio vigore*, the overriding public interest in the President's performance of his official duties would support the deferral of private civil litigation until the conclusion of the President's service in office.

II. PRIVATE SUITS AGAINST A SITTING PRESIDENT SHOULD BE STAYED UNTIL THE PRESIDENT LEAVES OFFICE

A. The power to stay civil proceedings is a basic and long-settled judicial power. Over a half-century ago, this Court held that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis* v. *North American Co.*, 299 U.S. 248, 254 (1936). The Court recognized in *Landis* that "[o]ccasions may arise when it would be a 'scandal to the administration of justice' * * * if power to coordinate the business of the court efficiently and sensibly [by staying proceedings was] lacking altogether." *Id.* at 255.

The courts and Congress have recognized a variety of contexts in which the public interest may require a stay of civil litigation. For example, a postponement or stay may be appropriate during the pendency of administrative proceedings (see, *e.g.*, *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 765 n.13 (1979); *Ricci* v. *Chicago Mercantile*

Exch., 409 U.S. 289, 306-307 (1973)), criminal proceedings (see, *e.g.*, 21 U.S.C. 881(i); *Koester* v. *American Republic Invs., Inc.*, 11 F.3d 818, 823 (8th Cir. 1993); *United States* v. *Mellon Bank, N.A.*, 545 F.2d 869 (3d Cir. 1976); 2 Sara S. Beale & William C. Bryson, *Grand Jury Law and Practice* § 8:07 (1986)), arbitration proceedings (*Moses H. Cone Memorial Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 20 n.23 (1983)), bankruptcy proceedings (11 U.S.C. 362; *Hill* v. *Harding*, 107 U.S. 631, 634 (1882); cf. *Coit Independence Joint Venture* v. *FSLIC*, 489 U.S. 561, 585 (1989) (FSLIC receivership)), or state court proceedings (*Heck* v. *Humphrey*, 114 S. Ct. 2364, 2373 n.8 (1994); *Harris County Comm'rs Ct.* v. *Moore*, 420 U.S. 77, 83 (1975); *England* v. *Louisiana State Bd. of Medical Examiners*, 375 U.S. 411 (1964)). Similarly, the Soldiers' and Sailors' Civil Relief Act, 50 U.S.C. App. 501 *et seq.*, provides for federal and state courts to grant stays in suits involving persons in military service in specified circumstances, 50 U.S.C. App. 521. See, *e.g.*, *Semler* v. *Oertwig*, 12 N.W.2d 265, 270 (Iowa 1943); *Coburn* v. *Coburn*, 412 So.2d 947, 949 (Fla. Dist. Ct. App. 1982).[10] The postponement of litigation in any of these circumstances may be as long as or longer than a President's term in office. Congress and the courts have thought this result justified, however, because of the weight of the public policies supporting a stay.

Staying a private suit until the conclusion of the President's term of office forestalls the "intrusion on the authority and functions of the Executive Branch," *Fitzgerald*, 457 U.S. at 754, that would result if the President

[10] Although we understand that the President does not claim relief under this statute, see Pet. Reply to Br. in Opp. 8 n.5, it demonstrates—like the other examples cited in text—that reasons of public policy may in certain circumstances require postponement of civil litigation.

were required to divert his attention to the task of defending himself against personal liability and submit his schedule to the control of a coordinate Branch. At the same time, staying the suit preserves the plaintiff's right to seek relief for a meritorious claim. It affects only when, not whether, the President must answer the allegations; it merely delays, rather than defeats, the vindication of the plaintiff's private legal interests. It is thus far less burdensome for plaintiffs than the absolute immunity from liability recognized in *Fitzgerald*.[11]

There is no reason to expect, at least as a general matter, that staying litigation will defeat a plaintiff's eventual ability to marshal evidence in support of his or her claims. If the circumstances of a particular case suggest an unusual risk that specific evidence will be lost—for example, if the case requires the testimony of an extremely ill witness—arrangements can be made to preserve that evidence without allowing a more general commencement or resumption of the litigation. Cf. Fed. R. Civ. P. 27(a), 27(c) (perpetuation of testimony).

Special concerns regarding the impact of a stay might be raised by private claims that seek immediate equitable relief, such as suits to enjoin ongoing unlawful conduct that is wholly unrelated to the President's official duties. In that context, there may be less assurance that a plaintiff's interests would be adequately protected if resolution of the suit were deferred until the President left office. But even if it could be shown that staying a

[11] A stay is preferable to dismissal without prejudice because a dismissal, unlike a stay, creates a risk that the limitations period will run before the suit is refiled. See, *e.g.*, *Wilson* v. *Westinghouse Elec. Corp.*, 838 F.2d 286, 290 (8th Cir. 1988); cf. *Wilton* v. *Seven Falls Co.*, 115 S. Ct. 2137, 2143 n.2 (1995); *Deakins* v. *Monaghan*, 484 U.S. 193, 202-203 & n.7 (1988).

particular lawsuit would seriously prejudice the plaintiff's interests, it would not necessarily follow that the litigation should be allowed to proceed while the President is in office. Where the public and constitutional interest in the President's unimpaired attention to his duties conflicts with the purely private interest of a plaintiff in obtaining immediate relief, the private interest must yield. See *Fitzgerald*, 457 U.S. at 754 n.37.

This Court need not decide, however, whether a plaintiff's interest in immediate relief could ever justify denying the President a stay during his term of office. It may be assumed, *arguendo*, that in truly extraordinary circumstances a stay would not be required. Whatever the scope of such an exception might be, it plainly would not extend to suits like this one, in which the plaintiff seeks only monetary relief. When a plaintiff seeks damages for alleged past misconduct, mere delay is highly unlikely to vitiate the relief.

The court of appeals appears to have believed that granting the President a stay would impermissibly place him "above the law." See Pet. App. 6 ("the President * * * is subject to the same laws that apply to all other members of our society"; "Article II * * * did not create a monarchy"). That objection disregards the temporary nature of the relief sought by the President. As noted above, a stay does not insulate the President from legal responsibility for his private actions; it merely affects the timing of the proceedings in which his liability is determined. A stay leaves the President as an individual subject to the same laws as other citizens, while protecting the vital public interest in his effective exercise of the "executive Power" of the United States.

The court of appeals also believed that a stay would infringe the constitutional right of plaintiffs to have access to the courts. Pet. App. 10, 17, 20-21. The statutory

and common law causes of action asserted here, however, may be subjected to procedural requirements and limitations designed to protect countervailing public interests. Moreover, because a stay affects only the timing of the litigation, the plaintiff's asserted constitutional interest is protected.[12] In this regard, we note that while the Bill of Rights guarantees the right to a speedy trial in criminal cases, see U.S. Const. Amend. VI, it lacks a similar guarantee for civil litigation.[13]

B. In contrast to the court of appeals, the district court held that the President is entitled to "temporary or limited immunity from trial." Pet. App. 70.[14] The district court declined to stay pretrial proceedings, however, allowing discovery to go forward "as to all persons including the President himself." *Id.* at 71. That disposition is incorrect.

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[12] As *Fitzgerald* demonstrates, in appropriate circumstances, the constitutional demands of the President's office may require a plaintiff to forfeit his or her right to legal redress altogether. If permanent immunity from liability does not offend the constitutional right of access to the courts, then, *a fortiori*, neither does the temporary deferral of litigation at issue in this case.

[13] The concurring opinion below is similarly mistaken in suggesting (Pet. App. 17) that a stay of the litigation would infringe the plaintiff's Seventh Amendment right to trial by jury. The Seventh Amendment addresses the question of who will decide contested issues of fact, not when such issues will be decided. See *Capital Traction Co.* v. *Hof*, 174 U.S. 1, 23 (1899) (Seventh Amendment "does not prescribe at what stage of an action a trial by jury must * * * be had").

[14] The district court's stay of trial proceedings covered the claims against Ferguson (see pages 2-3, *supra*) as well as those against the President. See Pet. App. 71. The court concluded that the stay should extend to Ferguson because the claims against him are "integrally related to the allegations against the President." *Ibid.* The United States agrees with that conclusion.

The touchstone of constitutional analysis in this case is the conflict between the demands of the litigation process and the President's attention to the duties of his office. Pretrial discovery is a primary source of that conflict. The discovery process often lasts far longer, and consumes far more of the parties' time and attention, than the eventual trial. For a sitting President, the discovery burden would be most prominent with respect to his own deposition, and whatever other discovery requests might be presented to him. The President would also be required to work closely with his attorneys on other discovery matters, such as identifying potential sources of discovery on the President's own behalf. The President's interests as defendant could not be adequately served during the discovery process without a substantial commitment of time and effort on his part, a commitment that could only come at the expense of his official duties.

The district court's failure to take account of those burdens is directly at odds with this Court's precedents regarding official immunity. Immunity is intended not only to insulate officials from the chilling effect of potential liability for government decisions, but also "to spare a defendant * * * unwarranted demands customarily imposed upon those defending a long drawn out lawsuit," including the demands of the discovery process. *Siegert*, 500 U.S. at 232; *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985) (same); *Harlow* v. *Fitzgerald*, 457 U.S. 800, 817-818 (1982) (same). Concern over the disruptive effects of pretrial discovery is a principal reason that courts resolve disputed questions of immunity at the earliest possible point, before discovery is allowed to take place. See *Siegert*, 500 U.S. at 232; *Mitchell*, 472 U.S. at 526; *Harlow*, 457 U.S. at 818 (until the "threshold immunity question is resolved, discovery should not be allowed."). It is also one of the reasons why orders denying motions to dismiss on

immunity grounds are immediately appealable. See, *e.g.*, *Mitchell*, 472 U.S. at 524-530. The law of official immunity thus reflects the recognition that pretrial discovery subjects public officials to serious and intrusive burdens. The significance of those burdens, and the need to avoid them, are at a constitutional zenith when the official in question is the President of the United States.

To be sure, on several occasions, sitting Presidents have given evidence as witnesses in federal criminal cases by means of depositions and interrogatories, while declining to attend (or being excused from attending) court to testify in person.[15] We know of no instance, however, in

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[15] We are not aware of any instance in which a sitting President has been compelled to testify at a trial, civil or criminal. President Jefferson was subpoenaed in *United States* v. *Burr*, 25 F. Cas. 30 (C.C.D. Va. 1807) (No. 14,692d), but the subpoena was directed only to documents. The President insisted that he was supplying the documents voluntarily, and he redacted portions of a subpoenaed letter that he determined should be kept confidential. See 11 *The Writings of Thomas Jefferson* 228, 363-366 (A. Lipscomb ed. 1904); *United States* v. *Burr*, 25 F. Cas. at 193. President Monroe was served with a subpoena to testify at a court martial. Based on the Attorney General's advice, however, he advised the court that he could not appear because his official duties were paramount. Although he stated that he would consent to a deposition, the court instead submitted interrogatories, which he answered. See Ronald D. Rotunda, *Presidents and Ex-Presidents As Witnesses: A Brief Historical Footnote*, 1975 U. Ill. L.F. 1, 5-6. President Grant initially volunteered to testify at a criminal trial of a former aide, but, after consulting with his staff, he chose to give a deposition instead. *Id.* at 3. President Nixon was ordered to produce tapes from his office in response to subpoenas *duces tecum* upon the government's showing of a "demonstrated, specific need for evidence in a pending criminal trial." *United States* v. *Nixon*, 418 U.S. 683, 713 (1974). President Ford was ordered to and did give a deposition for the criminal trial of Lynette (Squeaky) Fromme. See *United States* v. *Fromme*, 405 F. Supp. 578, 580-583 (E.D. Cal. 1975). Most recently, President Clinton has given videotaped testimony in

which a sitting President has been compelled to furnish evidence in connection with a civil proceeding.[16] In any event, the burden of full-scale pretrial discovery for the President as defendant would be greater than the burden imposed on him as a non-party witness. As a result, the historical examples of sitting Presidents giving evidence as witnesses in criminal cases do not support the district court's decision to subject the President to full pretrial discovery in a civil case where the President himself is the defendant.[17] The district court's insistence on allowing pretrial discovery "as to all persons including the President himself" is therefore an unduly intrusive solution that subjects the President and his office to constitutionally inappropriate burdens.

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connection with ongoing criminal prosecutions relating to the Whitewater affair. See *United States* v. *McDougal*, No. LR-CR-95-173 (E.D. Ark. Mar. 20, 1996) (order providing for President's videotaped testimony); *United States* v. *Branscum*, No. LR-CR-96-49 (E.D. Ark. June 7, 1996).

[16] Testimony of *former* Presidents has been sought in several criminal and civil proceedings. Former President Nixon was deposed in *Fitzgerald* and in *Halpern* v. *Kissinger*, 401 F. Supp. 272 (D.D.C. 1975). Former President Reagan gave a videotaped deposition in *United States* v. *Poindexter*, 732 F. Supp. 142 (D.D.C. 1990). Former President Bush moved to quash a subpoena for testimony in a criminal proceeding in 1993, but the motion became moot when the defendant entered a guilty plea. *See United States* v. *Drogoul*, No. 1:91-CR-78-1-GET (N.D. Ga. order filed Sept. 21, 1993).

[17] The production of evidence at a criminal trial has constitutional dimensions, since the Sixth Amendment guarantees a criminal defendant the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." See *United States* v. *Nixon*, 418 U.S. 683, 711 (1974). A plaintiff in a civil action can assert no comparable constitutional entitlement. Cf. *Fitzgerald*, 457 U.S. at 754 n.37 ("there is a lesser public interest in actions for civil damages than, for example, in criminal prosecutions").

C. Rather than permitting this litigation to be stayed, the court of appeals endorsed the alternative of "judicial case management." Pet. App. 13. The court of appeals called on the district court to exercise its discretion to avoid scheduling conflicts that would "thwart the President's performance of his official duties," and professed "every confidence" that the district court would do so. *Id.* at 13-14. At the same time, the court of appeals indicated that only "specific, particularized, clearly articulated presidential duties" would suffice to invoke the district court's scheduling discretion. *Id.* at 16. And the court stated its expectation that the district court would "move forward with * * * reasonable dispatch," "without impeding [petitioner's] right to have her claims heard without undue delay." *Id.* at 13-14, 16.

The court's reliance on "case management" to protect the office of the President is wholly misconceived. The court of appeals assumed that the President is free to turn his attention to private litigation whenever he is not occupied by "specific, particularized, clearly articulated presidential duties," Pet. App. 16, and hence that a court need only schedule litigation events to coincide with the President's free time. As explained above, however, the demands placed on the President are unceasing. See pages 10-13, *supra*. The President's superintendence of the Executive Branch requires that decisions regarding the relative priority to be given to diverse matters, and the amount of Presidential time and attention to be devoted to each of them, will be made by the President and by persons acting under his direction and control. Even during periods of time when no specific task occupies the President's agenda, moreover, "there is for the President a continuous burden of study, contemplation and reflection." Tourtellot, *supra*, at 372-373 (quoting President Eisenhower). The continuing distraction created by a

lawsuit seeking to impose substantial financial liability poses a significant threat to the President's unhindered performance of his official responsibilities.

The court of appeals' directive that this lawsuit should go forward necessarily impairs the President's authority to fashion an appropriate balance among the various demands of the office. Reliance on judicial case management, moreover, would necessarily enmesh the courts in an ongoing oversight of the President's schedule over a potentially extended period of time.[18] The process of case management envisioned by the court of appeals would disserve the interests of the judiciary as well as those of the President, by requiring the district court to undertake a politically charged inquiry into the relative importance of diverse Presidential activities—an inquiry for which no judicially manageable standards exist. The problem is compounded by the fact that the President may not be at liberty to provide the kind of "specific, particularized, clearly articulated" showing contemplated by the court of appeals. Particularly where sensitive matters of foreign affairs and national security are involved, the President may not be free to identify the issues that demand his attention. Indeed, precisely at moments of greatest crisis, it may be imperative for the President to convey the impression that nothing is amiss. A scheme that requires the President to identify and justify the official demands on his time to another Branch of government cannot accommodate those concerns.

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[18] President Jefferson long ago noted the threat to separation of powers posed by subjecting the President to civil process during his term of office: "But would the executive be independent of the judiciary * * * if the several courts could bandy him from pillar to post, keep him constantly trudging from north to south and east to west, and withdraw him entirely from his constitutional duties?" Kurland & Lerner, at 530-531; see *Fitzgerald*, 457 U.S. at 751 n.31.

Finally, reliance on case management potentially subjects sitting Presidents to broad and possibly inconsistent exercises of discretion by state and federal trial judges across the country. Even within the confines of the federal system, it is questionable how readily such exercises of discretion can be overseen by appellate courts.[19] Moreover, federal courts have no readily available means of correcting erroneous exercises of discretion by state courts. Yet the exercise of jurisdiction by state courts over a sitting President would pose risks to the integrity of the President's office at least as great as, if not greater than, the risks arising from comparable exercises of jurisdiction by the federal courts. If state courts were free to proceed with private suits against sitting Presidents, cases might arise in which local antipathy to the President could adversely influence the exercise of judicial discretion.[20]

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[19] The court of appeals suggested that "[i]f either party believes the [district] court is failing to discharge [its] responsibility, the proper course is to petition this Court for a writ of mandamus or prohibition." Pet. App. 16. As a general matter, however, extraordinary writs have severely limited scope in cases involving the exercise of discretion by district courts. See, *e.g.*, *Allied Chemical Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 36 (1980); *Will* v. *Calvert Fire Ins. Co.*, 437 U.S. 655, 665-666 & n.7 (1978) (plurality opinion).

[20] If this Court holds that the instant suit can go forward during the President's term of office, it is not clear whether a sitting President would have any remaining defense against being required to participate in suits in state court for acts unrelated to his official duties. On the one hand, Supremacy Clause principles might plausibly be thought to impose an independent barrier to the adjudication of such a suit. Cf. *Hancock* v. *Train*, 426 U.S. 167, 178-179 (1976) ("Supremacy Clause requires that federal functions "'be left free' of [state] regulation," particularly "where * * * the rights and privileges of the Federal Government at stake * * * find their origin in the Constitution"); *Feldman* v. *United States*, 322 U.S. 487, 491 (1944) ("[T]he

Even the court of appeals recognized that the instant lawsuit should be adjudicated in a manner "sensitive to the burdens of the presidency and the demands of the President's schedule." Pet. App. 13. Thus, the question is not whether respondent's interest in prompt resolution of her claims must be balanced against countervailing public and governmental concerns. The question is how the competing interests can best be reconciled. The court of appeals' approach would enmesh the district court in a politically charged, and potentially extended, oversight of the President's schedule, to the likely detriment of both the President and the court. A stay would avoid that intrusion on the President's conduct of his official duties, while preserving respondent's ability to obtain redress if her claims are ultimately found to have merit.

The Founders understood "Energy in the executive" to be an essential feature of "good government," and they intended the "structure and powers of the executive department" to assure to the President "all the requisites to energy." *The Federalist* No. 70, at 423 and No. 77, at 463 (Hamilton) (C. Rossiter ed. 1961). Subjecting the President to the indefinite and unpredictable demands of civil litigation during his term in office, and submitting the management of his schedule to the superintendence of another Branch of government, would contradict the Founders' design and frustrate their purpose.

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sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge of a State court, as if the line of division was traced by landmarks and monuments visible to the eye."). On the other hand, there is no readily apparent statutory basis for removal of such a suit to federal court in the absence of some ground of federal jurisdiction independent of the President's official status. Cf. *Mesa* v. *California*, 489 U.S. 121 (1989) (construing federal officer removal statute, 28 U.S.C. 1442(a), to authorize removal only where officer asserts a colorable federal defense).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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